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Public Prosecutor v Chong Joon Hong

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HIGH COURT (KUCHING) — CRIMINAL TRIAL NO 45–01 OF 2011
RHODZIAH BUJANG J
16 DECEMBER 2011

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Criminal Procedure — Trial — Acquittal without calling defence — Trafficking and possession charges under Dangerous Drugs Act 1952 — Prosecution's case riddled with inconsistencies — Prosecution's evidence insufficient to convict

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The accused was charged with trafficking in 4000.26g cannabis and for being in possession of 206.07g ketamine and 7.66g nimetazepam under, respectively, ss 39B(1)(a) and 12(2) of the Dangerous Drugs Act 1952 ('DDA'). The drugs were allegedly found during a raid on the accused's rented room on the ground floor of a bungalow by a three-man police party, led by SP5, acting on a tip-off. The other members of the party were SP6 and SP7. Numerous inconsistencies

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surfaced during the course of the prosecution's evidence, inter alia: (i) SP5, SP6 and SP7 gave differing accounts of the accused's initial reaction when he was asked by SP5 at the start of the raid as to whether he kept any drugs in the room; (ii) there was unexplained significant difference between the gross weight of the drugs after the seizure and their nett weight as found by the

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chemist (iii) SP5 undermined the prosecution's case by agreeing to various suggestions put to him by accused's counsel during cross-examination and (iv) the accused's room had a faulty door lock and was accessible to others.

Held, acquitting and discharging the accused without calling for his defence:

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(1) The essential ingredients of custody and control necessary to prove possession or to raise the statutory presumption on it under s 37(d) of the DDA had not been satisfactorily adduced by the prosecution (see para 33).

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(2) SP5's evidence jeopardised the prosecution's case. He agreed the cannabis and ketamine had been mixed up and were not the same exhibits seized; that the drugs were discovered after his men had checked the room, that he did not converse with the accused about the drugs and did not ask him to sign any document to show the caution was administered, that he did

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not ascertain the accused's preferred language before administering the caution in Bahasa Malaysia and that he did not tell the accused he was not obliged to tell him anything or answer any question (see paras 8–9).

(3) The three raiding officers gave different versions of what the accused did or said. The discrepancies could not be reconciled and they were not

explained. It was unsafe to rely on the inference to be gathered from their evidence that the accused had possession, particularly knowledge, of the drugs found in the room (see para 30).

(4) The anomaly on the weight of the drugs, particularly the lesser nett weight compared to the gross weight, was not explained in the re-examination of the chemist nor was SP5 recalled to explain it (see para 23).

(5) Neither SP5 nor the Investigating Officer testified about when exactly the former handed over the exhibits to the latter. No evidence was elicited from both officers about what happened to the exhibits in the interim period between the time they were seized and the time of the handing over (see para 8).

(6) The accused's room was accessible to others. The DNA report showed four other men had been in the room other than the accused. The accused's sister testified that two men and a woman visited the room just before the raid and she opened the room door with her car keys because the door lock was faulty. There were two sets of slippers of different sizes outside the accused's room and the accused's finger-prints were absent on the packagings of the drugs (see para 31–32).

[Bahasa Malaysia summary

Tertuduh dituduh dengan pengedaran 4000.26g kanabis dan kerana mempunyai milikan 206.07g ketamin dan 7.66g nimetazepam, yang masing-masing di bawah, ss 39B(1)(a) dan 12(2) Akta Dadah Berbahaya 1952 ('ADB'). Dadah-dadah tersebut dikatakan ditemui semasa serbuan di bilik yang disewa di tingkat bawah banglo, oleh tiga orang pihak polis, diketuai oleh SP5, bertindak atas maklumat sulit. Ahli-ahli pasukan yang lain adalah SP6 dan SP7. Timbul banyak percanggahan semasa pembuktian pihak pendakwaan, antara lain: (i) SP5, SP6 dan SP7 memberikan versi reaksi awal tertuduh yang berbeza-beza ketika dia disoal oleh SP5 pada permulaan serbuan tersebut tentang sama ada dia menyimpan sebarang dadah di dalam bilik; (ii) terdapat perbezaan ketara yang tidak dapat dijelaskan antara berat kasar dadah selepas penyitaan itu dan berat bersihnya seperti yang didapati oleh ahli kimia; (iii) SP5 telah menjejaskan kes pendakwaan dengan bersetuju dengan banyak timbul cadangan yang diletakkan kepadanya oleh peguam tertuduh, semasa pemeriksaan balas; dan (iv) bilik tertuduh mempunyai kunci pintu yang rosak dan boleh diakses oleh orang-orang lain.

Diputuskan, membebaskan dan melepaskan tertuduh tanpa memanggil untuk membela diri:

(1) Intipati penting bagi jagaan dan kawalan yang diperlukan untuk membuktikan milikan atau membangkitkan anggapan statutori di

bawah s 37(d) ADB telah dikemukakan dengan tidak memuaskan hati oleh pihak pendakwaan (lihat perenggan 33).

(2) Keterangan SP5 menjejaskan kes pendakwaan. Dia bersetuju kanabis dan ketamin telah bercampur dan bukan lampiran seperti yang disita; bahawa dadah ditemui selepas orang-orangnya telah diperiksa bilik; bahawa dia tidak berbual dengan tertuduh mengenai dadah dan tidak memintanya untuk menandatangani mana-mana dokumen bagi menunjukkan amaran yang telah diberikan; bahawa dia tidak menentukan bahasa pilihan tertuduh sebelum memberi amaran dalam Bahasa Malaysia dan dia tidak memberitahu tertuduh dia tidak diwajibkan untuk memberitahu dia apa-apa atau menjawab apa-apa soalan (lihat perenggan 8–9).

(3) Ketiga-tiga pegawai menggeledah memberikan versi-versi berbeza tentang apa yang tertuduh lakukan atau katakan. Perbezaan tidak dapat didamaikan dan mereka juga tidak dijelaskan. Adalah tidak selamat untuk bergantung kepada inferens yang dikumpulkan daripada bukti bahawa milikan tertuduh, terutamanya pengetahuan, dadah yang dijumpai di dalam bilik mereka (lihat perenggan 30).

(4) Anomali kepada berat dadah, terutamanya berat bersih yang lebih sedikit berbanding dengan berat kasar, tidak dijelaskan dalam pemeriksaan semula ahli kimia mahupun memanggil semula SP5 penjelasan (lihat perenggan 23).

(5) Baik SP5 mahupun pegawai penyiasat memberikan keterangan mengenai bilakah dia menyerahkan lampiran-lampiran kedua. Tiada bukti yang dibangkitkan dari kedua-dua pegawai mengenai apa yang berlaku kepada lampiran dalam tempoh sementara di antara masa mereka telah disita dan masa penyerahan dalam tempoh (lihat perenggan 8).

(6) Bilik tertuduh boleh diakses oleh orang lain. Laporan DNA menunjukkan empat lelaki lain telah berada di dalam bilik selain tertuduh. Kakak tertuduh memberi keterangan bahawa dua lelaki dan seorang wanita melawat bilik tersebut sebelum serbuan dan dia membuka pintu bilik dengan kunci keretanya kerana kunci pintu rosak. Terdapat dua set selipar yang berlainan saiz di luar bilik tertuduh dan cap jari tertuduh yang tiada pada pembungkusan dadah (lihat perenggan 31–32).]

Notes

For a case on acquittal without calling defence, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 4918.

Cases referred to

Hasamuddin bin Talena v PP [2002] 2 MLJ 408; [2002] 2 CLJ 504, CA (refd)
Law Yew Kwan v PP [2011] 5 CLJ 850, CA (refd)
Loh Kah Loon v PP [2011] 4 MLJ 260; [2011] 5 CLJ 345, FC (not folld)
Pang Chee Meng v PP [1992] 1 MLJ 137; [1992] 1 CLJ (Rep) 265, SC (refd)
PP v Mohd Radzi Abu Bakar [2006] 1 CLJ 457, FC (refd)
PP v Denish a/l Madhavan [2009] 2 MLJ 194; [2009] 2 CLJ 209, FC (refd)
Tan Yew Choy v PP [2010] 5 MLJ 212; [2009] 4 CLJ 245, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), 37(d), 37A(1)(b), 39B(1)(a)
Evidence Act 1950 s 27

Mahadhir bin Mohd Khairudin (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Shankar Ram (Thomas, Shankar Ram & Co) for the accused.

Rhodziah Bujang J:

[1] The accused faced three charges before me, of trafficking in 4000.26g of cannabis and being in possession of 206.07g of ketamine as well as 7.66g of nimetazepam. These are offences under s 39B(1)(a) and s 12(2) of the Dangerous Drugs Act 1952 ('the Act'), respectively. He was alleged to have committed the offences on 15 August 2010 at about 12.30pm at his rented room ('Room B') in a bungalow situated at Lorong Ketitir 1B4, Jalan Batu Kawa, Kuching.

DISCOVERY OF THE DRUGS

[2] When they raided the accused's room at that material time, the police in this case acted on information they received that drugs were kept in the said room. It must first be mentioned that from the photographs taken of the premises, the room of the accused was at the ground floor of the two storey bungalow.

[3] The raiding team in this case was led by Chief Inspector Azman bin Ismail ('PW5') and it comprised Detective Sergeant Jintu ak Ranggai ('PW6'), Detective Corporal Stap ak Angi, Detective Corporal Jonathan Amat, Detective Tang Poh Loong and Detective Constable Mumtaz bin Ismail ('PW7').

[4] When they all arrived at the crime scene, Detective Sergeant Jintu knocked on the door. When it was opened by the accused, Chief Inspector Azman said he asked the accused (after identifying himself as a police officer)

whether he kept any drugs in the room. The accused allegedly nodded his head. The accused then proceeded to open a three tiered cabinet (exh P15) and from the bottom tier he produced a small brown box (exh P16). Chief Inspector Azman said he then read the caution under s 37A(1)(b) of the Dangerous Drugs Act 1952 to the accused in Bahasa Malaysia which the latter said he understood. It must be noted that just before Chief Inspector Azman gave evidence the accused told the court that he understood Bahasa Malaysia and did not require the evidence to be interpreted to him in Bahasa Malaysia (see p 36 of the notes of proceedings). However after Chief Inspector Azman mentioned that he read the caution to the accused in Bahasa Malaysia, his counsel, Mr Shankar Ram immediately told the court that his client needed a Chinese interpreter and the accused added, when the recorded evidence of Chief Inspector Azman's was interpreted to him that he didn't quite understand the evidence given by the Chief Inspector. Be that as it may, the question of whether the caution was properly administered and understood by the accused is not crucial because of the discrepancies in the evidence of the raiding officers which will be discussed presently.

[5] Continuing now with the evidence of Chief Inspector Azman, the content of the brown box yielded eight slabs of compressed dried leaves, all wrapped in Chinese newspaper and another slab wrapped with transparent plastic which upon analysis by the chemist were confirmed to be cannabis. It also contained five small plastic packets of crystalline substance in a pink plastic packet and 125 aluminum strips marked 'Erimin 5' with each strip containing ten pills. A red plastic containing a plastic packet of crystalline substance was also taken out from the box. Subsequent analysis by the chemist found the crystalline substance to be ketamine and the pills to be nimetazepam.

[6] The accused also produced two additional slabs of cannabis wrapped in aluminum foil from the bottom tier of the cabinet. When asked if he kept more drugs, the accused took a brown checked bag from the middle tier of the cabinet. In the zipped front pocket of this bag another nine strips of similar 'Erimin 5' pills were produced and a small weighing scale. From the middle zipped pocket of the bag was found twelve transparent plastic packets of cannabis and from its back zipped pocket three packets wrapped with Chinese newspaper which contained 139, 199 and 199 pills respectively were found. Later analysis by the chemist found all the pills to be ketamine.

[7] Chief Inspector Azman said when he weighed all the drugs at his office after the seizure, the gross weight of the cannabis was 4249.39g, the crystalline substance, ie ketamine was 190.04g but he forgot the weight of the total number of 528 pills of ketamine nor that of the 134 strips of 'Erimin 5'.

[8] In the cross-examination of Chief Inspector Azman it was pointed out to

him although the raid was done in the afternoon at 12.30pm the police report tendered (exh P13) shows that it was made past midnight. This anomaly was explained by the witness and the investigating officer of the case that it was because the original report on the seizure of the drugs and the arrest of the accused was made at Sg Maong Police Station but when it was discovered that the police station should be that of Batu Kawa, he had to make the report there. Mr Shankar Ram stressed in his submission at the close of the prosecution's case on this anomaly in the time, which he said proves that there was a break in the chain of evidence pertaining to the exhibits. When I examine the evidence of Chief Inspector Azman on this issue, the first thing that I am clear is that the difference in the time of the lodging of the reports has been logically explained by him. I take judicial notice of the facts that the two police stations — Batu Kawa and Sg Maong are not that far apart for the confusion to have been made. However, it was not in the evidence of Chief Inspector Azman, *when* exactly he handed over the exhibits to the investigating officer, only that he did it after lodging the Sg Maong report No 2929/2010. *But that report was not tendered as evidence.* Although the handing over note signed by both Chief Inspector Azman and the investigating officer the case (exh p12) mentioned the time of handing over as 2100 hours on 15 August 2010, the investigating officer in his evidence also never said when he received the exhibits from of Chief Inspector Azman. No evidence was also elicited from both police officers what happened to the exhibits in the interim period between when they were seized, to the time of handing over, even if I am prepared to just accept the time of handing over as stated in the handing over note. This chink in the prosecution's case is further widen when in his cross-examination, Chief Inspector Azman *agreed with Mr Shankar Ram that the cannabis and ketamine have been mixed up and are not the same exhibits seized* (see p 51 of the notes of proceeding). He further agreed that the drugs were discovered after his men had checked the room (p 52 of the notes of proceeding) and that he did not discuss nor converse with the accused about the drugs and neither did he asked the accused to sign any document to show that the caution was administered to him. He also did not ascertain the preferred language of the accused before administering the caution in Bahasa Malaysia. He also agreed that he did not tell the accused that he was not obliged to tell him anything or answer any question and yes, he said, he was turning a discovery into an admission by the accused.

[9] I must pause here and state my observation that the above evidence of Chief Inspector Azman have indeed jeopardised the prosecution's case, the extent and impact of which will be clear when I discuss the other issues raised by the defence subsequently in this judgment. But for now, I will continue with the narration of the evidence of the other members of the raiding party called to testify by the learned deputy public prosecutor.

[10] Detective Sergeant Jintu's evidence differed from that of Chief

Inspector Azman in that instead of nodding his head when the accused was asked if he kept any drugs, the accused, according to the sergeant pointed to the cabinet whereupon Chief Inspector Azman administered the caution. He claimed to have seen the accused signed on the caution. This is of course contrary to what the Chief Inspector himself has admitted, in that no such signing ever took place.

[11] When Detective Constable Mumtaz gave evidence, his version of the accused's response when asked if prohibited items (not drugs) were kept in the room was again different from the other two police officers. The accused he said answered 'yes' to the question although like the sergeant, where the drugs were found were according to both of them just where Chief Inspector Azman said they were kept in his testimony in court. The caution according to the Detective Corporal Mumtaz was administered by Chief Inspector Azman right after the accused said yes.

OTHER ITEMS

[12] All three police witnesses were questioned and agreed when referred to the photographs taken during the raid that there were several items which were also at the bottom tier of the cabinet and which were taken out before the box itself. These items were not seized as exhibits in this case. There were also two sets of slippers outside of the room shown in one of the photographs tendered jn court (exh P4(4)) and the police witnesses agreed that these slippers were of different sizes. They were also not seized by the police.

CIVILIAN WITNESSES

[13] The prosecution called four witnesses, two of whom were the owner of the house and his daughter, one was the tenant in the house and another was the accused's sister. Their evidence established that the accused was a tenant of the room and that he was the first tenant of the room. The rental agreement was tendered as exh P5. The landlord ('PW1') admitted that he has the duplicate keys to all the rented rooms in his house including that of the accused which he kept in his room. He admitted throwing out a tenant who was of bad character but it was not clear from his evidence the point in time, in relation to the charge, when this happened because though at first he agreed that it was just before the raid (p 7 of the notes of proceedings), later in his cross-examination he disagreed that it was a few days after the accused was arrested. Lastly, he agreed with Mr Shankar Ram that he had changed the lock to the accused's rented room after his arrest because many people have access to the said room (p 15 of the notes of proceeding) though in re-examination he said he changed the lock because he had rented out 'that room to other people'.

[14] PW2, the landlord's son (who is the registered owner of the house) testified that the CCTV to the house was stolen after the accused was arrested and that a tenant was kicked out because of bad character/behavior. PW3, the landlord's daughter agreed that the lock to the accused's room was changed after he was arrested because it was faulty. She confirmed that the accused was the first tenant of the room.

[15] The woman tenant who gave evidence as PW4 testified that on 15 August 2010 at about 9pm she met a woman who claimed to be the accused eldest sister who came with two men. She said the sister tried to open the accused's room with her key to her rented room but failed. Her key was bent in the process. Later in cross-examination she said she could not recall the date of this incident. Bearing in mind that the raid was in the afternoon of 15 August 2010, this put the said visit after the arrest of the accused but the qualification she made in cross-examination when she said she forgot the date and time of the visit makes it unsafe for me to make a definite finding of fact on the said visit.

[16] The accused's sister, PW9, testified that after her brother told her he was arrested, she came to his rented room with one of their brothers and another friend. They met a lady who opened the gate for her and gave her a bunch of keys to open the door. When she failed to do so, she tried using her car key to open it and managed to do so. She claimed that the lady told her that she had helped the accused opened his room with her keys before and any key can be used to open the door of the accused's room because the lock is faulty. The learned deputy public prosecutor made an application to declare her as a hostile witness but later withdrew the application. This application was made before the cross-examination of the witness.

[17] In her cross-examination she identified PW4 as the lady who tried to help her with the access to the accused's rented room. She claimed that the lady told her that two males and a female had gone to the accused's room when he was not there but that she did not tell the truth to the court because she was scared of the police. There was no re-examination from the learned deputy public prosecutor on her evidence nor was the woman tenant recalled to clarify this ambiguity about the two males and female going to the accused room — whether they were infact the accused's sister and her two male companions as testified by her earlier or some other set of three persons as alleged by the accused's sister.

THE EXPERT WITNESS

[18] Other than the chemist, Mohamad bin Safie ('PW10') who analysed

A the drugs found, another chemist and a police officer who is a finger print expert, Sergeant Bayang Teron ('PW11') were also called to testify.

[19] The other chemist, Ms Rita Tie Ung Ha ('PW8') was asked to analyse seven cigarette butts, five crumpled tissue papers and a comb found in the B room. Her analysis showed that other than the accused, there were two other male contributors ('Male 1 and Male 2') to the DNA developed from the cigarette butts. She was also asked to analyse a pair of jeans and two t-shirts also seized from the room. On the jeans and one of the t-shirt, she detected not just C the accused's DNA but two other sources and they were not the Male 1 and Male 2 mentioned above. Whereas on the other t-shirt, she found a mixed profile of three sources, one of whom was the accused but the other two she was certain was not from Male 1 and Male 2 also. She agreed in her cross-examination that there were infact five different contributors, other than D the accused, of DNA on the said items she had analysed.

[20] The finger prints lifted from the transparent plastic (E3) containing the cannabis found in the brown box and the aluminum foils (E6 and E7) also containing cannabis found in the bottom tier of the cabinet were of poor E quality and were incapable of matching. In other words, they were a negative match as far as the accused was concerned.

SUBMISSION OF NO PRIMA FACIE CASE

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[21] Mr Shankar Ram agreed to submit first and then the learned deputy public prosecutor to reply thereafter. In his written submission, Mr Shankar Ram raised, inter alia, the following issues respecting the prosecution's case:

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(a) possibility of a mix up of the drugs seized;

(b) failure to prove that the first set of drugs discovered came from the brown box (exh P16);

(c) admissibility of the s 27 statement of the accused; and

H (d) presence of other persons in the room.

A MIX UP OF THE DRUGS SEIZED

[22] Central to this issue is the difference in the gross weight of the cannabis I and ketamine as weighed by Chief Inspector Azman and that found by the chemist in his analysis which was stated in the first and second charges. The gross weight of the cannabis as stated by Chief Inspector Azman, I repeat, was 4249.39g and that of the ketamine was 190.04g. However, in the charge the weight of the cannabis was stated as 4000.26g and the ketamine, 206.07g.

[23] When the chemist, Mohamad bin Safie gave evidence he was not asked to explain the difference in the weight though logically speaking the nett weight of the cannabis can be less than its gross weight after analysis. However the difference in the weight particularly the lesser nett weight compared to the gross weight must be explained by the chemist, not a logical deduction by me. As for the increase in the weight of the ketamine, on the face of the evidence pertaining to it, there appears to be a serious error because the nett weight cannot be suddenly more that the gross weight. But, when I examine the evidence of Chief Inspector Azman on this and compare it with the chemist report, it is clear that Chief Inspector Azman only weighed the ketamine in the form of crystalline substance but not ketamine in the pill form, which could very well account for the discrepancy in the weight of the said drug. However, it must be said that despite the cross-examination of the chemist by Mr Shankar Ram, the anomaly on the weight of these two drugs was not explained in the re-examination of the chemist nor was Chief Inspector Azman recalled to explain it. Adding to the weakness of the prosecution's case on this evidence was the admission of Chief Inspector Azman himself that there was a possibility of a mix up of the drugs which he seized in the raid with other cases which I have mentioned earlier. In the face of such glaring admission by of Chief Inspector Azman I find my conclusion on this issue strictured by it. As was stated by the Federal Court in *Tan Yew Choy v Public Prosecutor* [2010] 5 MLJ 212; [2009] 4 CLJ 245, when the gross weight of the drug is less than the nett weight found by the chemist after analysis the prosecution could not have proven the offence of trafficking beyond reasonable doubt.

[24] In this regard, I am aware that a recent Federal Court case has distinguished the ratio in *Tan Yew Ghoy*'s case. Raus Sharif Federal Court Judge in *Loh Kah Loon v Public Prosecutor* [2011] 4 MLJ 260; [2011] 5 CLJ 345 held that such a difference in the weight of the drugs is immaterial when there is no break in the chain of evidence pertaining to their movement. His Lordship also took into account of and distinguished the application of *Tan Yew Choy*'s case on the ground that the difference in the gross and nett weight of the drugs were way in excess of the statutory minimum for drug trafficking under the Act, unlike that of *Tan Yew Choy*'s case where the weight of the drug was only borderline.

[25] In this case, although the weight of cannabis found, at 4000.26g was obviously way above the statutory minimum of 200g I am unable to follow the ratio in *Loh Kah Loon*'s case not only because of the admission of Chief Inspector Azman but because of my earlier finding on the issue of the safe keeping of the exhibits after their seizure and the issue pertaining to the brown box which I will discuss below.

THE BROWN BOX

[26] To recapitulate, Chief Inspector Azman testified about the first set of

drugs being taken out by the accused from a brown box kept at the bottom tier of the cabinet. That brown box (exh P16) though said by Chief Inspector Azman to have been handed over to investigating officer, was not listed in the handing over note (exh P12) from Chief Inspector Azman to the investigating officer, even though the investigating officer confirmed receiving it and a photograph of it was taken together with the drugs in it (see exh P17(24)). Mr Shankar Ram further submitted that since there were other items also kept at the bottom tier of the cabinet as testified by the members of the raiding team which items are shown in the photograph taken after the discovery (exh P4(15)), that box could not have come out from the bottom tier. In fact, from a photograph of the outside of accused's room (exh P4(7)) there appears to be a brown box at the left hand side of the room (right hand side of the photograph) but none of the photographs taken in the room during the raid showed it.

[27] The learned deputy public prosecutor in his re-examination of Chief Inspector Azman attempted to repair this damage to the prosecution's case somewhat by asking Chief Inspector Azman to put the box in the bottom tier of the cabinet. His attempt was nevertheless futile because the cabinet was locked and it remained so until the case was closed as even when the investigating officer gave evidence, no key to it was ever produced by him. Further, even if such a key had been produced, the unfortunate thing for the prosecution was, the items taken from that tier of the cabinet were not seized. Chief Inspector Azman was also never asked in re-examination how these items were placed in that bottom tier viz-a-vis the brown box, just to illustrate if all of these things could have fitted into the bottom tier, such as if the items were actually placed on top of the brown box or at its side. Thus, although I am prepared to accept the testimonies of Chief Inspector Azman and the Investigating Officer that a brown box was indeed handed over to the investigating officer since a photograph of the exhibits showed that it was among the items seized, but the locked bottom tier of the cabinet leaves an unanswered gap in the prosecution's case.

[28] The above evidence and considerations of them demonstrate the unreliability of the prosecution's case relating to the discovery of the alleged drugs which compromised their case against the accused and what whittles it further is the discrepancy in the evidence of the three raiding officers pertaining to the initial reaction and response of the accused upon being asked with the question if he kept any drugs (or prohibited items) in his room ie the statement under s 27 of the Evidence Act 1950.

SECTION 27 STATEMENT

[29] As outlined earlier, the three raiding officers gave different versions of

what the accused did or said. To recapitulate, Chief Inspector Azman said the accused nodded his head, Detective Sergeant Jintu said the accused pointed to the cabinet and Detective Constable Muntaz said the accused answered 'yes' — I cannot reconcile the discrepancies in their evidence and further the last two witnesses as aforesaid were hot even asked to explain the said contradictions. It is therefore unsafe for me to rely on the inference to be gathered from their evidence in support of the prosecution case that the accused has possession, particularly knowledge of the drugs found in his room because case authorities even from the highest appellate court have decided the importance of admitting the exact words spoken by the accused before the statement can be relied upon, (see for instance the decision of the Court of Appeal in *Hasamuddin bin Talena v Public Prosecutor* [2002] 2 MLJ 408; [2002] 2 CLJ 504 and the caution made by the Supreme Court in *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137; [1992] 1 CLJ 265 that the court should always be vigilant when invoking s 27 'to ensure the credibility of evidence by the police personnel in respect of this section.')

[30] Assuming that I was wrong in making the above findings, in my view, the prosecution still has not proven possession (as understood in law) of the dangerous drugs on the considerations below.

PRESENCE OF OTHERS IN THE ROOM

[31] The defence, right from the cross-examination of the first witness, tried to establish that the accused's room was accessible to others; not just him prior to the raid and that just before the raid two men and a woman had come to his room. The scientific evidence in the form of DNA report done by Ms Rita Tie as I mentioned earlier shows that there were four other male persons who had been in the room other than the accused.

[32] The accused's sister's evidence which I had narrated earlier is most damning against the prosecution in that she qualified the evidence of the woman tenant who was not sure when this two men and a woman came, by saying that the visit was before the raid and worst, that she managed to open the door of the room with her car keys because the door lock was faulty. The evidence of the landlord and his daughter on the faulty lock strengthen her evidence and are not evidence which I could rationalise in favour of the prosecution.

[33] Other than these evidence, the admitted evidence of two sets of slippers of different sizes outside the accused's room point to an occupant of the room other than the accused and when viewed against the other evidence as stated above as well as the absence of the accused's finger prints on the packagings of the drugs as outlined by me earlier, I cannot help but agree with Mr Shankar

Ram that the essential ingredients of custody and control necessary to prove possession or to raise the statutory presumption on it under s 37(d) of the Act has not been satisfactorily adduced by the prosecution. I must however make clear that I am aware of the Court of Appeal's decision in *Law Yew Kwan v Public Prosecutor* [2011] 5 CLJ 850 that the absence of fingerprint is not conclusive against the prosecution but in this case it is one of the many weakness which when viewed in totality, adversely affects them. I am equally aware, since it was also cited to me by the learned deputy public prosecutor in his submission in reply, of the Federal Court decision in *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194; [2009] 2 CLJ 209 in which Abdul Aziz bin Mohamad FCJ held that possession need not be exclusive before a conviction of the offence can be had. However, the infirmities in the prosecution's case are such that I am left with no choice but to discharge and acquit the accused without his defence being called since the prosecution's case cannot withstand the maximum evaluation of the evidence as required by the Federal Court in *Public Prosecutor v Mohd Radzi Abu Bakar* [2006] 1 CLJ 457. This is because with all the infirmities present in the prosecution's case as outlined above, if the accused were to remain silent should his defence be called, I would not be able to convict him since the only affirmative evidence that the prosecution presented was that the accused was a tenant of the room and dangerous drugs were found in it. In my view, these two affirmative facts alone are not sufficient to sustain a conviction of the three charges.

[34] Despite concluding this judgment in favour of the accused, I am compelled to make a brief mention of another issue raised by Mr Shankar Ram pertaining to the two black bags shown in the photographs of the room taken during the raid (exh P4(15) and exh D5).

THE TWO BLACK BAGS

[35] Mr Shankar Ram submitted that these two bags were never seized and therefore were not sent to the chemist to determine if drugs were found in them. With respect, I see no merit in this argument because the evidence of the raiding officers were clear that drugs were found in the checked brown bag; not any other bags in the room. There is no need, in my view, to seize and hence determine if every other conceivable receptacles were used to keep drugs — only the ones where they were found are relevant.

[36] I would end this judgment with a final order that all the drug exhibits and their receptacles including the box and cabinet be destroyed by the prosecution after the lapse of the appeal period and similarly after the same

period, the belongings of the accused such as his clothings are to be returned to him. The rest of the exhibits, being only documents, are to be kept in the case docket.

Accused acquitted and discharged without being called for defence.

Reported by Ashok Kumar